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No. 05-18

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Does the Individuals with Disabilities Education Act (the "IDEA")'s attorneys' fee shifting provision, 20 U.S.C. 1415(i)(3)(B), authorize a court to award "expert" fees to the parents of a child with a disability who is a prevailing party under the IDEA?

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I.

INTEREST OF COPAA

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit, §501(c)(3) tax-exempt organization. Its primary mission is to secure high quality educational services for children with disabilities.

COPAA is premised on the belief that the key to effective educational programs for children with disabilities is collaboration -as equals- by parents and educators.

COPAA's chief concern is that parents of children with disabilities have equal access to established legal protections by ensuring the availability and quality of legal and advocacy resources for parents of children with all types of disabilities.

It is COPAA's belief that the IDEA was enacted specifically to provide all children with disabilities equal access to education. Moreover, because the heart of the IDEA is equal access, the IDEA contains the fee-shifting provisions that are at the heart of this controversy. Without the inclusion of expert fees in authorized awards of costs, fewer parties could afford to litigate, fewer parties who justly deserve to prevail would, indeed, obtain the promised access, and the very purpose of the statute would be undermined. As the Second Circuit's decision clearly demonstrated, expert fees are within the statute's authorization and the legislative history compels their

inclusion in awards to prevailing parties. The decision of the Second Circuit must be affirmed.[1]

II.

SUMMARY OF THE ARGUMENT

The court of appeals did not err in holding that IDEA's fee-shifting provision authorizes an award of expert fees as part of the costs available to a prevailing party.

The IDEA is founded on Equal Protection principles. Equal Protection principles must, therefore, inform the spirit of any interpretation of the statute.

Importantly, and key to the Court's decision, is the fact that awards of expert fees are necessary in order to fulfill the purpose of the IDEA – to ensure that all children, including those with disabilities, have equal access to education. Equal access should not mean that only children with disabilities whose parents can afford to bear the costs of litigation may obtain the education they need and to which they are entitled; rather, equal access should mean just that, true equality of access founded upon the ability of all parents to obtain a fair result for their children.

In keeping with the purpose of providing equal educational opportunity for all, in 20 U.S.C. § 1415, Congress provided a comprehensive statutory procedural scheme within the IDEA under which parents can obtain

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

due process if they believe their children are being denied an appropriate IEP. Congress did so, as this Court has noted, because they recognized that access to education may sometimes depend on access to the judicial system. *School Committee of the Town of Burlington, Mass. v. Dept. of Educ.*, 471 U.S. 359, 369 (1985). The statute provides for the award of costs to the prevailing parent, including attorneys' fees as an integral part of those reimbursable costs as it clearly stated in the legislative history of the act.

Because, as this Court recently ruled, parents bear the burden of proving that an appropriate IEP is not being provided for their children, and because the presentation of expert evidence is an indispensable part of the process of proof, the Court should not place its imprimatur on a system that deprives parents of the equal access to obtaining the proof which the Court itself requires.

Additionally, there is a prohibition against school boards using IDEA funds to pay attorneys fees and costs, which include expert fees. 34 C.F.R. 300.513(b)(1); 64 Fed.Reg. 12406-01, at 12515 (Mar. 12, 1999).

States have the obligation to provide a free appropriate public education, and meaningful equal access to it. If a State fails to meet its obligation, and a parent is forced to seek relief through the due process safeguards established by Congress to enforce its goals, then the Court should not accord a prevailing party an empty victory by forcing the parents to bear the costs of experts, without whose help, they would not have obtained a free appropriate public education for their children.

III.

ARGUMENT

A. IDEA's Purpose to Protect Constitutional Rights Would Be Frustrated if Expert Fees Were Not Awarded to Prevailing Parties

1. The IDEA was Enacted to Enforce the Equal Protection Clause of the Fourteenth Amendment

In order to answer the actual question at issue -- whether the IDEA's attorneys' fee shifting provisions authorize the payment of expert fees as part of the award of costs to the prevailing party -- the Court must first inquire whether such an award is necessary in order to fulfill the two primary interrelated purposes of the statute: that *all* children with disabilities have access to a free appropriate public education will be ensured and that their rights and the rights of their parents be protected. 20 U.S.C. § 1400(d)(1)(A),(B). Even the most casual inquiry demonstrates that awards of expert fees are crucial to ensuring that all children with disabilities have equal access to a free appropriate public education. As this court has observed, Congress anticipated disagreements between parents and schools over the rights of all children with disabilities to have equal access to a free appropriate public education. *Burlington,* 471 U.S. at 369. This fact and the fact "that in any disputes the school district would have a natural advantage" led Congress to "incorporate[] an elaborate set of ... 'procedural safeguards' to insure the full participation of the parents and proper resolution of

substantive disagreements." *Id.* In other words, access to justice is crucial to ensure equal access to education. And because access to justice depends on the ability to retain experts, without such awards, a substantial number of parents, by virtue of their economic status, will be unable make full use of the IDEA's procedural due process provisions in order to obtain the *free* appropriate public education the law guarantees. The dual purposes of the statute, ensuring FAPE to all children and protecting the rights of all parents, therefore, will not be served. 20 U.S.C. § 1400(d). Instead, the certain effect of a ruling excluding the award of expert fees as part of the attorneys fees allowed to prevailing parents will be to set up an impermissible class of wealthy parents of children with disabilities. That impermissible wealthy class would be able to take advantage of the IDEA's due process protections because they can afford to bear the costs of paying experts through all the levels of administrative and judicial hearings required in order to succeed in gaining an appropriate education for their children. Another class, parents without financial resources to litigate IDEA cases, will not be able to proceed because reimbursement for the costs of experts will not be available even if they do succeed. And without experts, it is impossible for any parent to successfully challenge an IEP proposed by a school board.

As the Court noted in speaking of the predecessor to the IDEA [2]:

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[2] *See* Pub. L. No. 94-142, 1975 U.S.C.A.N., 89 Stat. 773, 789. For convenience and readability, all versions of the Act will be referred to as the IDEA.

> The Act was designed to fill the need identified in the House Report – that is, to provide a "basic floor of opportunity" consistent with equal protection – neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access."

Board of Education of the Henrik Hudson Central School District, Westchester County, v. Rowley, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048-3049 (1982). The important principle stated therein is that "equal protection requires ... equal access." *Id.*

The Court in *Rowley* acknowledged that the interpretation and requirements of the IDEA fall squarely within Fourteenth Amendment jurisprudence. *Id.* The IDEA was enacted pursuant to Congress' enforcement power under § 5 of the Fourteenth Amendment. *Dellmuth v. Muth,* 491 U.S. 223, 228, 109 S.Ct. 2397, 2400 105 L.Ed.2d 181, n.1 (1989). It is more than a simple funding statute; rather, the IDEA confers upon disabled students an enforceable substantive right to public education in participating States. *Honig v. Doe,* 484 U.S. 305, 310, 108 S.Ct. 592, 597 (1988); *A.W. v. Jersey City Public Schools,* 341 F.3d 234, 248 (3d Cir. 2003). Thus, because it is founded on equal protection principles, the IDEA fundamentally is meant to provide equal access to the entire protected class of children with disabilities, not just the wealthy and the few.

Moreover, Congress made clear that it meant to ensure equal protection for children with disabilities in enacting the law. In its findings, Congress noted:

> While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children *and to ensure equal protection of the law.*

20 U.S.C. § 1400(c)(6) (emphasis added).

Two landmark cases, *Mills v. Board of Education of the District of Columbia,* 348 F.Supp.2d 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972) (*PARC*), set forth the foundational understanding of the Fourteenth Amendment principles on which the IDEA ultimately rests.[3] They were specifically referenced in the legislative history of, and played a significant role in the passage of the Education for All Handicapped Children Act of 1975. *Honig v. Doe,* 484 U.S. at 309, 108 S.Ct. at 597 (citing S. REP. 94-168 (1975), 6, 1975 U.S.C.C.A.N. 1425, 1430).[4] These principles are

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[3] The *Mills* and *PARC* cases influenced the understanding of this area of law which led to the reform of the EHA into the Education for All Handicapped Children Act of 1975 (EAHCA), P.L. 94-142, 89 Stat. 773, 775, which was then reinforced by the passage of the newly titled Individuals with Disabilities Education Act, P.L.101-476, § 901(a)(1) and (3), 104 Stat. 1103, 1141, 1142.

[4] Congress's stated its intent unambiguously:

> 'It is clear today that this 'right to education' is no longer in question.
> In 1954, the Supreme Court of the United States established the principle that all children be guaranteed equal educational opportunity. The Court stated: 'In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is

so embedded in present case law that many courts fail to make specific reference to them in reaching decisions over more recent controversies. These principles bear restating as they provide the necessary context and foundation on which this case must be decided. First, "the right to an education, once given, is a fundamental right,[5] therefore the defendants must show a compelling state interest in order to lawfully exclude [disabled] children." *PARC,* 343 F.Supp. at 283, n.8. Second, "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Mills,* 348 F.Supp. at 874 (*quoting Brown v. Board of Education,* 347 US. 483, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954)).

When Congress re-authorized the IDEA in 1997, it continued to link its authority and intent to the Fourteenth Amendment noting its desire to "restate that the 'right to equal educational opportunities' is inherent in the equal protection clause of the 14th Amendment of the U.S. Constitution," and that the IDEA is founded in and secured by the 14th Amendment." S. Rep. No. 104-275, at 31 (1996). Clearly, the IDEA is a civil rights act,

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> denied the opportunity of an education. *Such an opportunity . . . is a right which must be made available to all on equal terms.*' (Brown v. Board of Education).

S. Rep. No. 94-168 (1975), 6, 1975 U.S.C.C.A.N. 1425, 1430 (emphasis added). Note that the quotation from *Brown v Board of Education* is the very one that was quoted in *Mills. See Mills,* 348 F.Supp. at 874. The same language was written into the 1975 statute, the purpose of the statute being to "assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Pub.L. No. 94-142 §3(a), 89 Stat. 775 (1975).

[5] This is not to say that there is a fundamental Constitutional right to education. However, once a child enters the school system, the equal access obligations of the IDEA apply.

implementing the equal rights protection clause of the Fourteenth Amendment and it places an affirmative obligation upon the States to provide children with disabilities a free and appropriate education.[6] There simply is no compelling state interest that Petitioners can articulate which will allow them to use their superior resources and access to trained educational personnel and experts to deny disabled children their right to a free appropriate public education. Yet that is the result of reading the award of expert fees out of the fee-shifting statute. There can be no equal opportunity, no equal access to a public education that is both free and appropriate unless all families with children with disabilities, rich, poor and those in the vast middle, are able to obtain that education on the same terms as the wealthy.

The doctrine of equal educational opportunity is intertwined with the equitable allocation of resources. In a like manner, equal educational opportunity as an expression of equal protection is also intertwined with due process. The *Mills* court quoted Judge Skelly Wright's definition of equal educational opportunity and its connection with due process as follows:

> The doctrine of equal educational opportunity –the equal protection clause in its application to public school education – is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment.

Mills, 348 F.Supp. at 875, *quoting Hobson v. Hansen,* 269 F.Supp.410, 493 (D.D.C.1967). This relationship of

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[6] *See* 143 Cong.Rec. 7925 (1997) (Sen.Harkin) and *id.* at 8187 (Sen. Lott).

allocation of resources to equal protection and due process is the connection that supports the inclusion of expert fees in attorneys' fees awards for prevailing parties under the IDEA. This is because the fee-shifting statute is part of a procedural process set up specifically to provide parents of children with disabilities with the ability to challenge schools regarding the appropriateness of the children's IEP and it is part of the inherent due process guarantees built into the IDEA.

2. IDEA's Procedural Safeguards Require the Provision of Expert Fees to Prevailing Parties

In keeping with the purpose of providing equal educational opportunity for all, in 20 U.S.C. § 1415[7], Congress provided a comprehensive statutory procedural scheme within the IDEA under which parents can obtain due process if they believe their children are being denied an appropriate IEP such as would meet the IDEA's affirmative guarantees.

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[7] Section 1415 places an affirmative burden on States to establish procedural safeguards:

> Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

20 U.S.C. § 1415(a).

Among the extensive procedural safeguards provided parents under the IDEA are the right to be accompanied and be advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities; present evidence and confront, cross-examine, and compel the attendance of witnesses;[8] bring a civil action once administrative remedies are exhausted,[9] and an award of attorneys' fees as part of the costs to the parent of the child with disabilities who is a prevailing party.[10]

The statute itself sets forth that right for parents to resort to experts as an integral and necessary part of the due process procedures – "the right to be accompanied and be advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. 1415(h)(1). Congress clearly associated advice of counsel and advice of individuals with special knowledge or training as a unified category within the same clause of the same sentence of the same due process provision. *Id.* It also provides for the award of costs to the prevailing parent, including attorneys' fees as an integral and necessary part of those due process procedures. 20 U.S.C. 1415(i)(3)(B). The importance of these rights to parents, their relation to providing FAPE to children, and their role in carrying out Congress' intent and overall scheme is clear on the record of this case. As made clear both by the prior direct association of experts with attorneys within the same statutory clause and by the legislative history of the statute,[11] the right of parents to

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[8] 20 U.S.C. 1415(h).

[9] 20 U.S.C. 1415(i)(2).

[10] 20 U.S.C. 1415(i)(3)(B).

[11] As discussed more fully below, Congress stated in its Conference Committee Report that

recoup the costs of expert fees is among the due process rights accorded to parents of children with disabilities in order to ensure that equal access is available on equal terms to all.

Quite simply,

> A finding that the prevailing party may recover expert fees is the *only way to effectuate the overall purpose of the IDEA* – to protect the rights of children with disabilities and parents of those children. To enforce these rights, children and parents must incur significant costs, not the least of which are the fees to utilize experts, who are commonly needed in IDEA cases to establish a child's learning disability. Many school districts employ child and education experts on staff. If parents were unable to recover their expert fees, they might be unable to hire their own expert to effectively challenge the school district's position, thereby diminishing their ability to protect their rights to "free appropriate public education... designed to meet their unique needs."

Brillon v. Klein Independent School District, 274 F.Supp.2d 864, 872 (S.D.Tex 2003), *rev'd on other grounds,* 100

> [t]he conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as the traditional costs incurred in the course of litigating a case.

H.R. Conf. Rep. 99-687, at 5 (1986), *reprinted in* 1986 U.S.C.CA.N. 1807, 1808.

Fed.Appx.309 (5th Cir. 2004) (citations omitted)(emphasis added).[12]

As a further matter, because the Court recently held that the burden of proof in IDEA cases is on the complaining party, usually the parent, *Schaeffer v. Weast*, ___ U.S. ____, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), denying the recovery of expert fees to the prevailing party will diminish or negate their due process rights. In order to meet their affirmative burden, parents must present admissible evidence relating to technical and medical findings, a burden that is impossible to meet without an expert. The requirement for an expert for a successful case under the IDEA has been noted by many, including Justice Ginsburg in the dissent to *Schaffer:*

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[12] *See also Gross ex rel. Gross v. Perrysburg Exempted Village School Dist.* 306 F.Supp.2d 726, 739 (N.D.Ohio.2004) ("An award of expert witness fees as part of attorney fees and costs under IDEA conforms with the unique nature of IDEA proceedings. Adversarial IDEA proceedings routinely involve diagnosis of a child's disability or disabilities by one or more doctors or other experts. The parties to such proceedings rarely could conduct a thorough and complete presentation and evaluation of a child's educational needs without consulting experts as to the child's physical, mental, social, and emotional condition and educational needs."); *Pazik v. Gateway Regional School Dist.*, 130 F.Supp.2d 217, 221 (D. Mass.2001) ("The payment of expert fees is consistent with the purpose of the IDEA ... to ensure that states provide all disabled children with a "free appropriate public education." As the Supreme Court explained, the EHA "guarantees to parents the right to participate in the development of an [IEP] for their handicapped child, and to challenge the appropriateness of their child's IEP in an administrative hearing with subsequent judicial review." *Id. (citing Dellmuth v. Muth,* 491 U.S. 223, 225, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989)).

> It bears emphasis that the vast majority of parents whose children require the benefits and protections provided in the IDEA lack knowledge about the educational resources available to their child and the sophistication to mount an effective case against a district-proposed IEP.

Shaeffer, 126 S.Ct. at 540 (Ginsburg, J., dissenting)(citations and quotations omitted). That expert testimony is pivotal to the success of these cases was also clearly recognized in and part of the Second Circuit's rationale in its holding in the case on appeal: "Expert testimony is ... critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures that school boards have offered to secure a free appropriate public education." *Murphy v. Arlington Central School District Board of Education,* 402 F.3d 332, 338 (2d Cir. 2005).[13]

It is not enough, therefore, under due process requirements, to provide a gateway to relief, but then to lock out those who seek relief by tossing away the key to the gate – the key here being the availability to expert fees to the prevailing party. As Congress recognized, without expert assistance, parents of children with disabilities will not have the opportunity to be heard in a meaningful manner on the issue of obtaining meaningful access to a free appropriate public education. *Cf. Mathews v. Eldridge,* 424 U.S. 319, 552, 85 S.Ct. 893, 47 L.Ed.2d 18 (1976) (due process requires an opportunity to be heard at a meaningful

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[13] Many other courts have remarked the same, including: (*B.D. v. Buono,* 177 F.Supp.2d 201, 208 (S.D.N.Y. 2001); *Field v. Haddonfield Bd. Of Educ.,* 769 F.Supp. 1313, 1323 (D.N.J.1991).

time in a meaningful manner). Consequently, without the right to recoup expert fees, the gateway to relief will be locked to parents who cannot afford to obtain the essential expert assistance that they must have in order to meet their affirmative burden of proof.

3. The Petitioner's Competing Concern to Limit or Reduce Its Budget Does Not Outweigh the Requirement of Providing Equal Access to a Free Public Education to All Children

Both Petitioner and their supporting Amici argue in various ways that Congress has expressed concern with reducing litigation costs by including mediation as a means of resolving IDEA disputes and by authorizing the reduction in attorneys fees awards in certain circumstances, such as when parents unreasonably protract the resolution of the dispute. This observation, however, does not support their next contention that allowing expert fees will drive up the costs of litigation.

> "[Sc]hool districts not only will be required to pay for parents' experts (in cases where parents prevail), but also school districts will be increasingly forced to hire their own experts to refute the positions taken by the parents' experts in due process hearings..."

Brief of Amici Curiae National School Boards Association, *et al,* p.18. This contention constitutes a reversal of reality. Indeed, the likelihood that school districts will have to hire outside experts is small as school districts already have

access to their own special education teachers and experts, who largely work on staff, in paid positions. This underlines the very reason why expert fees must be allowed so that parents who disagree with school boards can successfully challenge their decisions. Congress provided parents with the procedural right to obtain their own experts *because* they understood that experts were "necessary for the preparation of the parent or guardian's case in the action or proceeding..." H.R. Conf. Rep. 99-687, at 5 (1986), *reprinted in* 1986 U.S.C.CA.N. 1807, 1808.

The fact that allowing expert fees will force school districts to bear those costs was well understood and weighed by Congress when it drafted the statute and when the conferees wrote their conference report. However, because the very purpose of providing equal access is thwarted by restricting due process procedures meant to guarantee such access, the school districts' interest in reducing costs does not outweigh the need of parents with children with disabilities to have that equal access. As the *Mills* court stated,

> The defendants are required by the Constitution of the United States, [the IDEA,] and their own regulations to provide a publicly-supported education for these "exceptional' children. Their failure to fulfill this clear duty... and their failure to afford them with due process hearing...cannot be excused by the claim that there are insufficient funds...
>
> Constitutional Rights must be afforded citizens despite the greater expense involved.... [and] ... [t]he inadequacies of the [School Board] ... certainly cannot be permitted to bear more heavily

> on the "exceptional" or handicapped child than on the normal child.

Mills, 348 F.Supp. at 876.

The Petitioner's and Amici's positions demonstrate the truth of the observation in *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 865 (6th Cir.2004): "Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole." [14] The Court should bear in mind, that the very reason parents need experts is to ensure that they have a full and fair hearing when they disagree with a school board's view of their child's educational needs. Indeed, it is only when the parent is the prevailing party, when the parents have been vindicated in their claim that the defendant has actually violated the IDEA, that they can receive an award of costs.

The Petitioner would like to turn the process on its head, and under the guise of "cooperation" achieve the goal of reducing its affirmative responsibility under the IDEA to provide a free appropriate public education by restricting, even negating, parents' ability to challenge the School

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[14] Indeed, as the Court noted in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 77-78, 119 S.Ct. 992, 999, 143 L.Ed.2d 154 (1999), although "the potential financial burdens imposed on participating States may be relevant to arriving at a sensible construction of the IDEA...Congress intended to open the door of public education to all qualified children..." Thus the Court rejected the District's cost-based interpretation: "This case is about whether meaningful access to the public schools will be assured"...[and therefore] "[u]nder the statute, our precedent, and the purposes of the IDEA, the district must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools." *Id*, 526 U.S. at 79, 119 S.Ct. at 1000.

Board's decisions. "Unfortunately for the district, the "free" in FAPE means free to the student, not to the district." *Gagliardo v. Arlington Central School District,* ___ F.Supp.2d ___, 2006 WL 561233 (S.D.N.Y. March 3, 2006).

In sum, denying awards of expert fees conditions equal access to a public education to parents who can afford the cost of experts and creates an implied criterion of wealth. It will produce a serious chilling effect on those seeking merely to enforce the rights already given.[15] It alters the affirmative obligation of schools to comply with the IDEA by making parents bear the cost of seeking redress when the schools have actually already deprived the disabled child of his or her right to a free public education. It takes the "free" out of "free appropriate public education" and denies equal access on equal terms to *all* children with disabilities.

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[15] As the court in *Holbrook v. District of Columbia* stated in the context of attorneys fees awards,

> "[U]nreasonable penny-pinching scrutiny, such as Defendant has engaged in here produces serious chilling effects on the availability of competent, experienced attorneys to serve this clientele. This is extremely problematic for a number of reasons, not the least of which is that IDEA practice is highly specialized – an attorney who does IDEA work must understand the intricacies and the realities of the practice in order to obtain effective relief for his or her client in terms of an appropriate, individualized educational placement.

305 F.Supp.2d 41, 48 (D.D.C. 2004). The same is true with respect to expert fee awards.

B. Because the IDEA's Purpose is to Impose An Affirmative Equal Protection Obligation, The Court Should Not Limit Courts' Discretion to Award Costs

Petitioner and Amici seek to contract the IDEA's remedial scope and to undermine its remedial scope by restricting the meaning of the phrase "reasonable attorneys fees as part of the costs" to exclude the award of expert fees. They argue that Congress derives its authority for the IDEA from the Spending Clause and that therefore expert fees cannot be part of the attorneys' fees or costs. That would not be true even if IDEA were solely a Spending Clause statute. However, as demonstrated, the IDEA is a mixed statute. It derives its authority to impose an affirmative remedial constitutional obligation on the States from the Fourteenth Amendment and is clearly not a "simple funding statute." *Honig v. Doe,* 484 U.S. at 310. As the Court stated in *Doe*,

> Congress' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory...In amending EHA to its present form, Congress rejected its earlier policy of merely establishing an unenforceable goal requiring all students to be in school.

484 U.S. at 311, n.1 (citing 121 Cong.Rec. 37417(1975) (remarks of Sen. Schweiker)). What Congress did do was to set up an affirmative substantive obligation on the states to ensure that "children with disabilities receive an education that is both appropriate and free" and to provide

funds to aid the States in fulfilling that duty. *See Rowley*, 458 U.S. at 208.

Indeed, Part B[16] funds may not be used for litigation expenses. The Code of Federal Regulations states that "in any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 34 C.F.R. § 300.513 (a). Importantly, it goes on to provide that "funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the Act and subpart E of this part." 34 C.F.R. § 300.513 (b)(1).[17]

To be clear then, the affirmative obligations Congress imposes on States derive from its authority under the Fourteenth Amendment equal protection clause. Because this is an equal protection statute, Congress has gone out of its way to provide significant and comprehensive due process protections to the parents of

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[16] Part B funds are those provided to the states for special education and related services.

[17] As explained in the Federal Register:

> ...The limited Federal resources under this Act should be used to provide special education and related services and not be used to promote litigation of disputes. Further, that paragraph has been modified to make it clear that the prohibition against using Part B funds for attorney's fees also applied to the related costs of a party in an action or proceedings, such as depositions, expert witnesses, settlement, and other related costs.

Reg. 64 Fed. Reg.R 12406-01, at 12515 (Mar. 12, 1999). Moreover, this same prohibitory language is found at 64 Fed.Reg. 53808, 53812 (Sept. 5, 2002) regarding the Early Intervention Program for Infants and Toddlers with Disabilities, Part C.

children with disabilities. It has, from its Spending Clause authority provided aid to States as a means of ensuring that its intent to ensure equal access to a free appropriate education for all.

The IDEA grants courts considerable discretion and equitable authority to make parents whole where school districts have violated the substantive and procedural requirements of the statute. *Florence County School District v. Carter,* 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993); *Burlington,* 471 U.S. at 369. The Court in *Carter* noted

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private placement of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate school in an appropriate private setting oaf the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

510 U.S. at 15, 114 S.Ct. at 366. The same logic applies whether the cost the school district must bear to make parents whole and to ensure that the "free" in "free appropriate public education" is free is for reimbursing parents for private school tuition, or for the reimbursement of expert fees expended to ensure the parents have equal access to the procedural due process protections provided them in the statute.

If the Court restricts the application of section 1415(i)(3)(B) to exclude the award of expert fees, the result will be the same that the Court foresaw in *Carter* and *Burlington*. "It would be an empty victory," for parents who sought their due process rights under the statute and prevailed, "to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials...such a result would be contrary to IDEA's guarantee of a "free appropriate education." *Carter*, 510 U.S. at 12 (*quoting Burlington*, 471 U.S. at 370, 105 S.Ct. at 2003).

The Court would have to put on blinders in order to ignore Congress' clear statement of the true substance of the IDEA purpose. The Court should not place its imprimatur on a system that provides parents with procedural safeguards and then leaves them with an empty victory when they are forced to make use of those safeguards or that deprives parents altogether of the equal access to obtaining the proof which the court itself requires because the parents cannot bear the cost of obtaining that proof. The Court should uphold the remedial purpose of the IDEA, which was to provide equal access on equal terms to a free appropriate education for all children with disabilities by ensuring that the full due process safeguards intended by Congress are vouchsafed to those who are forced to fight a recalcitrant school district *and prevail*.

IV.
CONCLUSION

For all of the foregoing reasons, the Court should affirm the Second Circuit.

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Respectfully submitted,

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